Denver Law Review

Volume 37 | Issue 6 Article 1

May 2021

Non-Tax Advantages of the Revocable Trust (with Emphasis on Use as Will Substitute)

Milton E. Meyer Jr.

NON-TAX ADVANTAGES OF THE REVOCABLE TRUST (WITH EMPHASIS ON USE AS WILL SUBSTITUTE)

BY MILTON E. MEYER, JR.*
(in collaboration with Hayes R. Hindry)

There are no important tax advantages associated with the revocable trust.[1] However, it is important to stress that there are no tax disadvantages connected with this legal form of temporarily or (if death intercedes) permanently disposing of property. Stated another way, where the living trust is intended to be used in whole or in part as a will substitute, all the estate and income tax savings that can flow from one or more skillfully drawn testamentary trusts (including full use of the estate tax marital deduction) are equally available from a skillfully drawn revocable trust.[2]

This article will be devoted to a discussion of the non-tax advantages of the revocable trust—particularly those advantages that arise from the legal fact that the corpus of a properly drawn revocable trust escapes the rigors of probate upon the death of the grantor. It will be presumed that the reader has a basic familiarity with the legal concept of trusts and general principles of estate planning. The trusts we will deal with will have the common denominator of revocability—which includes, of course, the retained right in the grantor (or someone else) to alter or amend the terms of the trust and to add or withdraw assets from the trust corpus.

Authors of estate planning treatises typically give brief but favorable mention to the revocable trust (frequently referred to as the "revocable living trust"[3]) and allude to its ever increasing use. However, comment on the device is generally limited to a terse summary of commonly conceded advantages, with only passing reference to what, in this writer's opinion, is the greatest advantage offered—the economic advantage that can result from the legal avoidance of probate administration.

I. AN ENUMERATION OF ADVANTAGES

The advantages usually cited for the living trust include the following:

1. *Affords a Preview of Post-Death Administration.* By setting up the trust in his lifetime, the grantor is in a position to observe the facility with which his trustee accomplishes the objectives of the trust, making necessary changes in the trusteeship or the provisions of the trust as may be warranted.

2. *Affords a Useful Substitute for an Agency Relationship or a Potential Conservatorship.* If a person travels frequently or exten-

*Mr. Meyer is a member of the Denver and Colorado Bar Associations and a member of the Denver firm of Hindry, Erickson and Meyer. His article is based on a 1960 address given to registrants of the course "Practical Problems in Estate Planning and Family Tax Planning" offered by the University of Denver College of Law.

1 Income of the revocable trust continues to be taxed to the grantor: Int. Rev. Code of 1954, § 676. Nothing is removed from the estate for federal estate tax purposes: Int. Rev. Code of 1954, § 2038. Similar results pertain under most state taxing laws. See, however, comment at note 27, *infra*.

2 Because of the revocability of the transfer into trust, no gift tax liability is incurred. *Burnet v. Guggenheim*, 288 U.S. 280 (1933).

3 To distinguish this form of trust from the testamentary trust which comes into existence after death, under the provisions of a will.

sively, or is called into military service, it may be necessary for him to entrust the handling of his investments or business affairs to another. An agency relationship suffers from its vulnerability to sudden legal termination by reason of the death or legal incapacity of the principal. The problem is especially acute when the principal is not heard from for protracted periods and might be dead (as during war time) or is the subject of a mysterious disappearance. At a time when the necessity for the functioning of an agent might be the greatest, the power of the agent to act might cease to exist or, at the very least, be uncertain. All these difficulties can be prevented by the intelligent use of a living trust in lieu of the agency technique.

A similar sophisticated use of the revocable trust is available to a person of advanced age or poor health who is realistic enough to recognize that the continued passage of time might result in a gradual impairment of faculties and judgment (whether or not sufficient eventually to justify legal adjudication of incompetency) that renders him unable to handle his own affairs with safety. The living trust offers a non-public and highly flexible solution to this potential problem and ought probably to be urged by members of the family where there is foreseeable danger that such a person may slip into that twilight zone where competency regresses but adjudication is either unwarranted or undesired. The properly drawn trust, of course, not only provides for the grantor during the balance of his life, but makes disposition of the trust property for the benefit of his family at his death. By keeping such a trust revocable, psychological hazards are frequently avoided. Furthermore, an irrevocable trust for the support of a grantor would lack the income and estate tax advantages normally associated with this legal form.[4]

3. *Affords (Within Limits) a Choice of Applicable State Law.* Although not free from doubt[5] it seems fairly clear that the grantor of a revocable living trust (particularly as to that portion of the corpus which is personalty) can specify that the law of a state other than his domicile shall govern all matters of administration and interpretation of the trust. It is clear, for example, that residents of New York State (where more restrictive rules as to trust accumulations and perpetuities have pertained in the past) have avoided these restrictions by setting up trusts in New Jersey or some other state of their choice, utilizing trustees domiciled in such other states, and specifying that the law of such other states shall govern. Whether one can avoid the property laws of his own jurisdication by taking lesser steps than suggested above is a highly technical question involving conflict of laws principles and is beyond the scope of this paper.

4. *Affords Less Vulnerability to Attack by Disgruntled Heirs.* Because a properly drawn and executed revocable trust will, as a

4 Where income of an irrevocable trust is reserved by the grantor, he not only remains taxable with respect to such income, but the corpus will be included in his estate: Int. Rev. Code of 1954, § 2036.

5 See Shattuck, An Estate Planner's Handbook, Chapter IX (1951).

matter of law, escape probate in virtually all jurisdictions, the opportunity for successful attack by disgruntled parties is substantially lessened. Probate procedure in most jurisdictions literally invites all comers to attack the validity of a will, and the highly technical requirements of testamentary disposition frequently provide the opportunity for successful attack. Quite the contrary is true with respect to circumstances surrounding the living trust. Requirements for execution are simple (normally the attested signature of the grantor is sufficient; formal acceptance by the trustee is seldom a prerequisite to a valid trust). If the trust has been in existence for a period of time prior to the grantor's death, there is a *fait accompli* aspect to the trust that discourages attack at his later death. Furthermore, the privacy of the trust (commented on later) and the absence of notice requirements can result in a situation where the dissident element may not even be advised of the grantor's death until long after its occurrence.

As will be emphasized at another place, the very advantages discussed under this heading put a grave responsibility on the draftsman of a living trust to discourage the use of the device where the grantor's intent is to prevent his wife, creditors or others normally protected by law from an effective assertion of their rightful claims.

5. *Affords Continuity of Investment Management and Flow of Income.* Every lawyer is familiar with the delays and problems that can attend the administration of a decedent's estate—assets must be located and marshalled, the interest or lack of interest of the decedent in a piece of property must be verified, heirs and beneficiaries must be located and served with various formal notices and given their opportunities to interpose objections. If the legal representative and his lawyer have no particular prior familiarity with the extent and nature of the property interests or the identity and whereabouts of interested parties, the problems become especially acute. Meanwhile, a widow and perhaps minor children have to be supported; a business, possibly, must somehow be run or, more likely, ground to an orderly halt. It is of necessity a time for conserving, liquidating, refraining from taking any investment action, however potentially rewarding. At best, it is a time of uncertainty and anxiety for the family of the deceased; at worst, it is downright chaotic, with real financial hardship (or, equally bad, the fear of it) affecting the family.

A properly drawn living trust can go a long way towards solving the above-described problems. In the first place, the grantor has had to take a good look at his assets (or at least some of them) at the time he placed them in the trust—widely scattered assets are likely to have been assembled; assets requiring some attention have probably received it. In any event, someone besides himself (namely, his trustee or trustees) has been inserted into the picture during his lifetime—an opportunity an executor or administrator rarely gets. Secondly, while the grantor may, if he chooses, continue as the dominant party in his trust arrangement for the balance of his life, controlling investment policy and asset management and deriving chief benefit from the trust income, the machinery has been set up to provide a continuity of asset management at his death and an immediate shift of income flow from himself to other members of his family. An active business that may constitute an asset of the trust has a better opportunity, perhaps, of continued existence for the benefit of the family than if subject to probate; investment opportunities normally not available to or availed of by an executor or administrator can be taken advantage of by the trustees if the trust provisions so permit; improper or deteriorating investments can be disposed of promptly without the necessary procedural delays attendant upon probate that may aggravate losses.

6. *Affords Greater Privacy.* For persons who crave privacy, the living trust performs another valuable function. Unlike the probate file, which is a public record containing a copy of the will, asset inventories, schedule of debts, and the like, the trust file is completely private. While disclosure of assets and liabilities must be made to taxing authorities by trustees as well as executors, appropriate laws normally prevent dissemination of this information. If there are probated assets in addition to trust assets, it is true that, under the law of most states, a copy of the inheritance tax return (listing all assets) may eventually have to be filed in the probate file. However, this is generally long after public curiosity occasioned by the death has diminished.

Sometimes probate file disclosures about a business interest which is part of a probate estate have given aid and comfort to competitors or resulted in a reduction in the value realized on liquidation. These hazards can generally be avoided where the interest is part of a living trust.

7. *Affords Substantial Immunity from Creditors and Other Claimants.* While morally a less defensible reason for considering use of the revocable living trust, it is true that, under the laws of most states, the grantor can preserve his assets from attack by creditors or others ordinarily having rights against his assets by placing them in such a trust. While normally attaching only after the grantor's death, there is reason to believe that limited immunity from creditors can apply in some jurisdictions even before the grantor's death.[6]

Of interest to Colorado lawyers is the fairly recent *Von Brecht* case in which the Colorado Supreme Court upheld the validity of a living trust against the claim of a surviving wife where the grantor established the trust with respect to substantially all his property six years before his marriage.[7]

8. *Affords Opportunity for Substantial Economic Savings.* In the judgment of the writer, this can be by far the most spectacular of all the advantages of using the revocable living trust. The balance of this paper will be devoted to demonstrating how this can be so and in making practical suggestions concerning the achievement of these savings. Since the magnitude of these savings is in direct relationship to the amount of property successfully placed

---

6 *Id.* at 74, 91-94, 97.

7 Denver Nat'l Bank v. Von Brecht, 137 Colo. 88, 322 P.2d 667 (1958). The court commented with apparent favor on the earlier Colorado case of Thuet v. Thuet, 128 Colo. 54, 260 P.2d 604 (1953) as follows: "The trust in that case was upheld as against a plaintiff *who was the wife of the settlor at the time it was created*. Here the trust was set up and in full operation for six years before the settlor married the lady who now seeks to invalidate the agreement." (Emphasis supplied) The foregoing is quoted verbatim because of factual differences between the transactions in the *Thuet* and *Von Brecht* cases.

in a trust of this kind, this paper will emphasize the desirability of placing most of one's property in the trust—all, if possible. This is one place where, if a little bit is good, a lot is even better.

II. USE OF TRUST AS A WILL SUBSTITUTE

Undoubtedly there are still lawyers who shudder at any open reference to the use of the revocable living trust as a will substitute. However, since the *Von Brecht* case, previously alluded to, there would appear to be no valid reason in Colorado to fear that an expressed intention to utilize a revocable living trust in place of a will to accomplish an ultimate disposition of property will cause the effort to be struck down as an attempted testamentary disposition that fails to satisfy the technical requirements of a will. The Colorado Supreme Court said in that case:

> Where, as here, the property involved in a trust is assigned, transferred and set over to the trustee and remains in the name of the trustee, the interest of the settlor therein passes to the trustee in presenti and while the settlor remains alive the transfer is inter vivos and not testamentary. Hence, if an owner of property can dispose of it inter vivos and thereby render a will unnecessary for accomplishment of his practical purposes, he has a right to do so. *The motive in making such a transfer may be to obtain the practical advantages of a will without the necessity of making one, but the motive is immaterial.* (emphasis supplied)[8]

With this judicial "green light" smoothing over any legal obstacles to the use of the living trust in Colorado, what is the measure of the potential economic savings? Are we talking about enough in dollars to warrant the use of a non-familiar pattern of doing things? Where do the savings actually arise? Are there not other substantial costs incurred in the use of the living trust so that the hoped for savings are less than claimed? Does not the grantor lose substantial control over his property? These are some of the questions we will now endeavor to answer.

An example will be helpful. If a Denver resident dies, leaving a probate estate of $250,000, his estate will incur an executor's fee of $9,000[9] (if the executor claims the full statutory fee allowable) and attorney's fees of $10,300[10] (if the lawyer claims no more than

---

8 *Id.* at 99, 322 P.2d at 672.

9 Colo. Rev. Stat. § 152-14-16 (Supp. 1957).

10 The Minimum Fee Schedule adopted by The Denver Bar Association on March 12, 1958 reads in part as follows:

"*Estates*

A. Minimum Charge—regardless of inventory	$150.00
B. Percentages based on gross value of property and assets inventoried in County Court (these percentages do not include services rendered in connection with insurance, joint tenancies, and other property or assets not included in inventory)	6% of gross to $5,000 5% of next $20,000 4% of next $225,000 3% of next $250,000 No recommendation for balance of fee on estates exceeding $500,000
C. Percentage based on all property and assets not inventoried in the County Court, which require the preparation of legal instruments, state or federal inheritance tax returns (including particularly all assets and property in joint tenancy, and all life insurance in excess of $50,000.00)	1% of the total gross value thereof."

the "minimum" fee prescribed by the Denver Bar Association).[11] By tradition and custom (and probably by law) in Colorado, as well as in virtually all other jurisdictions, an attorney is always employed to represent the executor or administrator during probate where the fiduciary is a non-lawyer or trust company. Normally this is the attorney who prepared the will, if a will is probated, and this practice is rather uniformly adhered to around the country. There will also be various other administrative costs incurred. Tables have been prepared which estimate total administrative costs for various sizes of estates on a national average basis.[12] These expenses, of course, are in addition to federal estate tax and state inheritance taxes, which apply in any case where the estate is large enough, whether or not a will is used.

Illustrating the savings is the actual case of an elderly Denver resident who, resisting persuasive efforts favoring the living trust, insisted that the writer prepare for him a will containing a testamentary trust for his family. Such a will was executed by him early in December of 1958. A week later he decided he wanted the living trust instead. One was prepared for him which achieved the same family objectives and tax savings as his will had. This was executed on December 31, 1958. He died ten months later leaving a taxable estate of over $400,000, slightly less than one-half of which was in joint tenancy with his wife with the remainder being in his living trust. Not one item of property had to be probated. Although the jointly held property would not, of course, have been probated in any event, the consequent savings to his family resulting from his decision to utilize the living trust still amounted to almost $17,000 net.[13]

---

11 It will be of interest to Colorado lawyers that the attorney's fee for handling a $250,000 probate estate in Denver is $2,550 more than for the same estate in Chicago and $2,875 more than the same estate in Milwaukee (see report of Survey of Bar Association Schedules prepared by a special Committee of American Bar Association appearing in 98 Trusts and Estates, 1012-14 (1959).

It is of further interest to compare the figure of $10,300 (the attorney's fee for a probate estate of $250,000 in Denver) with the fees for the same size estate in 15 other states having statutory or statewide Bar Association fee schedules, as summarized in 99 Trusts and Estates 719-21 (1960). The average of such fees in these 15 states is approximately $7,350.

12 The following are excerpts from "Tax Planning Tables" published by Institute for Business Planning, Inc.:

Gross Estate Less Debts	*Probate and Administration Expenses*
$100,000	$ 8,200
200,000	15,400
300,000	22,200
400,000	28,700
500,000	35,000
1,000,000	64,000

13 In Denver the jointly held property attracts an attorney's fee of 1% under the minimum fee schedule.

In a similar case familiar to the writer, where the grantor died just five months after replacing his will with a living trust which contained his entire estate of some $450,000, the savings to his family exceeded $25,000 net.

If all this is true, why is the living trust not more frequently used? Why is it that many persons of property are not even aware of the living trust as a total or partial alternative to the use of a will?

A well-known authority on estate planning stated in one of his better known works:

> The [revocable living trust] device would be used even more, in the author's opinion, if it were not for overzealous preoccupation among businessmen (and to a dangerously large degree among lawyers) with prospective tax savings.[14]

While the above observation of the distinguished writer is possibly correct, it is this writer's view that only the New England restraint of the quoted authority prevented him from citing additional reasons in explaining why the device is not more frequently used. For example, it is the present writer's belief that more important reasons for the infrequency with which the living trust is used as a total or partial will substitute would have to include the following:

(1) Unfamiliarity with the potentialities of the living trust on the part of many attorneys and financial advisors.

(2) An unwillingness on the part of some clients, even after adequate explanation, to depart from patterns they consider familiar.

(3) An "overzealous preoccupation" (to borrow from the passage quoted above) among some lawyers and some representatives of corporate fiduciaries with the perpetuation of the application to decedents' estates of tradition-hallowed, time-honored, but overly-protective and elaborate judicial machinery, which application has the incidental effect of providing very handsome legal and executor's fees for the same lawyers and corporate fiduciaries for work that frequently is quite routine, if time consuming, in nature.

The point last made will be vehemently denied by many attorneys and trust officers. A number of "legal" arguments will be brought to bear for the purpose of demonstrating the dignity of and necessity for the formal administration of decedents' estates. There will, perhaps, even be vague references to "illegality," "sham," "fraud" and the like directed at efforts to by-pass probate through use of the living trust.

Nevertheless, the late Professor Thomas E. Atkinson, in his well-known and scholarly work on the law of wills,[15] states ". . . in more than half of the cases in which people leave some property, it has been found possible to avoid administration."[16] After citing the expense, delays and inconvenience of administration as being the

14 Shattuck, *supra* note 4, at 76.
15 Atkinson, Wills (2d ed. 1953).
16 *Id.* at 566.

causes for attempts to dispense with probate, he continues "The popular demand for reform in the latter field [probate court procedure] is largely inarticulate, but is nonetheless real as shown by the efforts to shun the probate courts. Yet one who seeks to find a solution to the problems of dispensing with or shortening the administration of decedents' estates is literally a voice crying in the wilderness."[17] Possibly the third point stated above suggests a reason why this is so.

Probate procedure has its origin in the English ecclesiastical courts of several centuries ago. As modified in both England and America, it has served a vital need in protecting the property of a deceased for his beneficiaries and creditors and against marauders and unscrupulous debtors. This was accomplished essentially through the extraordinary police and coercive powers of the judicial tribunal, however ponderous and complex.

In the last several decades, however, the economic and sociological development of this country has produced a number of refinements in the techniques of property ownership, property transfer and debtor-creditor relationships that have made unnecessary in most cases resort to the courts for the enforcement of rights. For example, recording statutes, rules and regulations of stock transfer agents, the regulations surrounding ownership of United States Savings Bonds and other registered evidences of indebtedness, rules relating to the protection of depositors in commercial and savings banks, the extent to which commerce is carried on through checks, drafts, notes and other highly regulated secured and unsecured credit transactions without recourse to cash and other bearer forms of wealth, the popularity of safety deposit boxes with their technical rules regarding access, and the extensive use and development of the various forms of life insurance contracts. All these have minimized the danger of unauthorized persons making off with the deceased's assets, leaving family and creditors high and dry. A large part of the function of the probate court has therefore been filled by other, less cumbersome, means without, however, depriving aggrieved parties of recourse to the courts. The chief remaining functions—the satisfaction of creditors of the deceased (including taxing authorities) and the orderly passage of title to the designated beneficiaries of the deceased can certainly be accomplished without the necessity of formal administration.

One is certainly free to question the need for the more costly, complex and dilatory processes of probate administration, if a revocable living trust can accomplish, as to all or some part of a person's estate, the following things:

1. Complete freedom to alter the distributive pattern right up to the moment of death or incapacity.

2. Instantaneous transfer of assets from decedent's control to that of his chosen beneficiaries (or to trusts for their benefit and protection).

3. Titles as indefeasibly vested as if they had been processed through probate.

4. Immediate availability of income for decedent's beneficiaries.

[17] *Id.* at 575.

5. All the estate tax and inheritance tax minimization that can be accomplished through a well-drawn will.

6. Full protection for decedent's creditors and the various tax collectors.

7. Preservation of the rights of aggrieved heirs and others interested in the estate to test their claims against the estate in court.

8. Elimination of or substantial reduction in administration expenses that range from 5% to 10% of the value of the estate.

9. The securing of all the other advantages listed at the outset of this article.

10. The accomplishment of all the foregoing without interference with decedent's enjoyment of his property prior to his death.

The writer's experience is that the properly drawn revocable living trust can and does accomplish the above-stated objectives in a most satisfactory manner.

The remainder of this article will be devoted to a discussion of a few of the techniques and practices that can be employed by the draftsman of a revocable living trust to insure the accomplishment of these objectives. It will also deal with the questions, raised earlier, of whether the cost of using the living trust form substantially reduces the hoped for savings and whether the grantor must divest himself of all real control over his assets.

III. TECHNIQUES IN DRAFTING AND ADMINISTRATION

A. The Matter of Costs.

Even though a client believes (or takes on faith) that the revocable living trust will accomplish the various objectives detailed in Part II (most of which cannot be achieved until at or after his death), he is not generally interested in going further unless he can also be persuaded that he can live with (1) the cost in dollars of (a) getting the program into operation (expenses of drafting and related legal services, transfer fees, etc.) and (b) continuing the program during the balance of his life; and (2) the cost in reduced control over his assets resulting from the immediate legal effectiveness of the trust. Future benefits are fine, but they are never as real as the current detriments incurred in achieving them.

The question of the legal fee for drafting and related services must, in the judgment of the writer, be forthrightly dealt with. The investigative and fact-finding activity of the attorney must be extensive because he must take specific action with respect to each of the client's assets. However, the determination of family objectives and the applications to them of tax minimizing procedures is no more and no less than that involved in traditional forms of estate analysis and planning; the drafting burden is not substantially greater than when the will with testamentary trust is the keystone of the estate plan, rather than the revocable living trust.

The essential difference comes from the fact that the draftsman who utilizes the revocable living trust instead of the will must charge and be paid a realistic fee for his current services; he has no near-vested interest in the client's estate at the client's death comparable to that enjoyed by the draftsman of a will which permits the latter to charge a completely non-realistic fee (or no fee at all) for his estate planning services, secure in the knowledge that he or his firm will almost certainly be employed to represent the executor during the probate of the estate.[18] The magnitude of the economic reward for this service has been previously commented on.

The fee, then, charged his client by the draftsman of the living trust should be substantial enough that, consistent with the criteria set forth in the canons of ethics,[19] he is amply compensated for his services on a current basis completely without reference to any post-death bonus. This cost is one the client must be persuaded to incur, notwithstanding the advantages purchased by him will not be substantially realized until after his death. This means, of course, that the amount of the charge must, nevertheless, be modest when set alongside expected savings. The grantor must also be informed that there will likely be some additional legal costs after his death relating primarily to the necessity for filing inheritance tax and estate tax returns. However, it can be pointed out that such services should be compensated on the strength of their own merits, the same as any other specific legal services. It will also be noted that custom and practice does not require that the draftsman perform these services.

The other elements of "cost" described above—current cost of operating the trust, and the cost measured in loss of control—are best dealt with, in the view of the writer, by the combined factors of (1) the selection of trustees and (2) non-disclosure of the trust during the grantor's life.

1. *Selection of the Trustees.* The writer wishes to make clear that he is no enemy of the trust companies. He is a firm believer in the worth of their contributions to the solution of problems of property ownership and management and recommends their use in almost every instance where the term of a trust survives the death of the grantor, and in some instances where this is not so. However, to avoid needless trust management expenses and an unacceptable loss of control and freedom of management with regard to his estate during the grantor's lifetime, the writer suggests in most cases that the grantor and two other individuals serve as trustees

18 Not only would the normal attorney-client relationship be expected to produce this result, all things being equal, but in most communities it is the announced practice of the corporate fiduciaries, when named executor in wills, to employ the respective draftsmen to represent them during probate of the particular estates. This is an area where restraint on the part of the attorney in initial charges and the requisite amount of patience are twin virtues likely to be handsomely rewarded at a later date.

19 "In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; . . . (4) the amount involved in the controversy and the benefits resulting to the client from the services . . ." Canons of Professional Ethics, § 12.

until the grantor's death or legal incapacity, at which time a predesignated trust company takes over as successor, generally sole, trustee.

There is, of course, no legal barrier to the grantor's serving as his own trustee.[20] The insertion of additional individual trustees in the picture is for the simple purpose of facilitating the transfer of the title to the trust res to the successor trustee upon the death or legal incapacity of the grantor. Without the probable factor of survivorship of one or both of the two co-trustees, the mechanics of transfer of legal title with respect to the trust res to the successor trustee at death or adjudicated incapacity of the grantor-trustee would require the intervention of a court (although the trust would certainly not fail). It is, of course, the avoidance of any court intervention (whether probate or otherwise) which is sought to be achieved by use of the revocable living trust.

The duties and responsibilities of the individual trustees other than the grantor are real but not generally substantial. All income from the trust res is reserved by the grantor to himself during his life. It can be received by him in his capacity as a trustee and used

20 The grantor can be sole beneficiary if he is one of two or more trustees, or he can be sole trustee if he is one of two or more beneficiaries. 2 Scott, Trusts § 114 (2d ed. 1956). Both conditions apply under the technique suggested herein.

In Colorado, the case of Dunham v. Armitage, 97 Colo. 216, 48 P.2d 797 (1935), thought by some to require a contrary conclusion, is easily distinguishable. There the grantor, purporting to establish a trust with another as trustee, retained possession in herself for life in a non-fiduciary capacity, along with the "rents, issues and profits" and the power of revocation. The court properly held this to be an attempted testamentary disposition. This distinction is recognized in the Von Brecht case (see note 6, *supra*) where transfer of title and possession to the *trustee* was actually accomplished.

by him as a beneficiary. His retained power to amend, alter or revoke the trust gives him effective (and legal[21]) control over the corpus. The other trustees share with him (as joint tenants with right or survivorship[22]) the legal title to the trust assets. In the event of the grantor-trustee's absence (explained or unexplained) or his physical or mental incapacity (short of legal adjudication) the other trustees, under a well-written instrument, will, acting without the grantor-trustee, have authority to expend trust income and corpus for the benefit of the grantor and his dependents. Their prime duty, of course, comes after the grantor's death or adjudicated incapacity in transferring title to trust assets to their successor trustee.

Although complete and detailed record-keeping by the trustees of the affairs of the trust is to be encouraged (and good business practice would dictate that this be done), a certain informality in this regard should not be fatal to the bona fides of the trust. The federal tax law, of course, treats the revocable living trust as a nullity for tax purposes; the grantor continues to report all income from the trust in his personal return and is given the benefit of all deductions of the trust, just as though the trust did not exist.[23] It further appears that there is no requirement that the trustees of a revocable living trust file a Form 1041 (fiduciary income tax return) with respect to the trust income.[24] Most state laws follow this rule (or apply no penalty for non-compliance with return requirements). In the administration of the typical trust of this type during the grantor's lifetime, distinctions between income and principal (except for income tax purposes) are generally ignored.

The very existence of a revocable trust frequently breaks down what might otherwise be a psychological resistance on the part of an individual to keeping his financial house in order (thereby avoiding the problem of marshalling the assets that confronts many executors upon the death of their testators). An accurately maintained inventory of trust assets is a minimum requisite.

Viewed against the foregoing, it is apparent that adult members of the grantor's family, or close friends or business associates, might well serve as co-trustees with him. Normally they would be expected to serve without compensation. Closeness of relationship brings no adverse tax results, of course, because of the absence of estate tax or income tax advantages in the use of the revocable trust.

Selection of the successor corporate trustee brings into play all the criteria normally employed in the selection of a corporate fiduciary.

2. *Non-disclosure of the Trust.* It is the writer's recommendation that the existence of the trust be not disclosed (so far as the

21 The court in *Denver Nat'l Bank v. Von Brecht*, 137 Colo. 88, 97, 322 P.2d 667, 671 (1958), quotes with favor from *National Shawmut Bank v. Joy*, 315 Mass. 457, 53 N.E.2d 113 (1949): "A reservation by a Settlor of the power to control investments [resulting from the reservation of a power to alter, amend or revoke the trust] does not impair the validity of the trust."

22 2 Scott, Trusts § 194 (2d ed. 1956).

23 Int. Rev. Code of 1954, §§ 671, 676.

24 Rev. Rul. 57-51, 1957 Int. Rev. Bull. No. 6, at 14.

general public is concerned) during the grantor's lifetime. This stems not from any apprehension that the revocable trust is not a respectable legal vehicle or that knowledge of its existence would invite attack. It arises, rather, from a recognition that the freedom of trustees to deal with the assets of a trust is substantially inhibited if transfer agents, title examiners, and potential buyers and sellers are put on notice of the existence of a trust. Over the years the law has placed great burdens on persons dealing with trustees and trust assets to inquire into the authority of the trustees to act.[25] The fear of such persons that they may suffer economic loss by failure to so ascertain this authority frequently restricts the ability of trustees to buy or sell trust assets on a favorable basis.

The usual way for a trustee to conceal the existence of a trust is to carry the title to trust assets in the name of a nominee. Most all corporate fiduciaries have one or more such nominees (individuals, partnerships or corporations) for this purpose (certain administrative economies can also be achieved by professional trustees in the use of the nominee). Consequently, a revocable living trust should contain provisions permitting nominee registration of trust assets.

A variety of nominee techniques are available to the individual co-trustees during the grantor's life. The most useful (and most obvious) one is the placing of legal title in the joint names of the trustees with rights of survivorship and not as tenants in common, without indicating their fiduciary capacities. This should be supported by a private agreement signed by all the trustees and kept in the possession of the grantor in which they acknowledge that whenever they hold title to property in the manner described above, they are doing so as trustees of a particularly described trust, and not for their individual benefits. In effect, the trustees are serving in their individual capacities as nominees for themselves as trustees. The survivorship feature insures the probability of someone being available with the legal capacity and the equitable duty of making the final transfer to the permanent successor trustee (or, in a proper case, outright to persons designated in the trust instrument) upon the demise or legal incapacity of the grantor.

This technique lends itself particularly to securities,[26] real estate, and savings accounts. In many areas, (including Denver) checking accounts can likewise be maintained in the names of three joint tenants. In a few instances, the trustees may have to use the names of only two of their number as nominees, but this should afford no problem. Dividend and interest checks made out in the three names can be deposited in a checking account established in the joint names of the nominees without necessity of personal endorsement. Funds can then be checked out for the benefit of the income beneficiary.

Where securities are concerned, a simplification of the foregoing can be achieved through use of a joint brokerage account in the individual names of the trustees. "Street name" registration of securities by the broker removes some of the cumbersomeness of the

25 Restatement (Second), Trusts §§ 288, 291, 297, 326 (1959).

26 Watch, however, inclusion of stock of so-called "Sub-chapter S" or "tax-option" corporations. Ownership by a trust will disqualify the corporation from the tax benefits of Sub-chapter S. Int. Rev. Code of 1954, § 1371(a)(2).

three-name registration and makes easy the handling of income. Furthermore, transfer of trust assets is facilitated as the signatures of all trustees (or the prior execution of assignments separate from certificates by one or more of them) is rendered unnecessary. This multiple signature requirement normally would be a problem only when one of the trustees lives some distance away, is temporarily absent, or is physically incapacitated.

It is frequently possible to handle tangible personal assets in the three-name manner as well. A properly executed bill of sale and the "back-up" nominee agreement should provide sufficient authority for the trustees to deal with such assets, notwithstanding that actual possession is retained by the grantor as one of the trustees.[27] An alternative available where grantor and his spouse are both alive is the execution of a joint agreement where each recognizes that certain tangible personalty (described generally or specifically) is owned by them as joint tenants with rights of survivorship. Such an agreement should have the salutory effect of avoiding probate as to such assets while making it unnecessary to transfer such assets into trust.

Nominee alternatives to the three-name joint tenancy practice are afforded by the use of "dummy" corporations and partnerships. In either case, a contract between the corporation or the partnership and the grantor (or the trustees) is executed which affirms that the legal entity, for a valuable consideration, is holding title to particular assets solely as agent or nominee and subject to the order of the grantor (or the trustees). Where the grantor is a party to the agency contract, his rights therein should be made expressly assignable, in order to permit transfer to his trustees. Where a grantor owns oil interests in a number of states, for example, the proper use of the corporation for title holding purposes in avoiding a number of costly ancillary administrations is apparent (although such a corporation should be qualified to do business in the several states). Inheritance tax obligations at the grantor's death must still be examined by the trustees.[28]

In a proper case an existing active corporation (rather than a "dummy" created for the purpose) can be used for this nominee purpose. Where a "dummy" is used, care must be exercised to prevent its being treated as a taxable entity. Proper maintenance of corporate minutes, avoidance of bank accounts in the corporate name, and the filing of corporate income tax returns showing "no assets, no liabilities, no income, no expenses" should assist towards this end. Dividend checks received in the corporate name should probably be endorsed to the trustees or directly to the income beneficiary without deposit in a corporate account, although, properly substantiated, even this should afford no problem. A partnership used for this purpose would hold title to assets in its entity name.

27 That this arrangement is not entirely unrealistic is supported by the fact tax conscious individuals sometimes make gifts of valuable tangibles such as art works, libraries, yachts, and the like to charities, reserving possession for life. Whether this is technically a reserved legal life estate or a reserved life interest in a trust, the technique appears entirely valid and is recognized for tax purposes (the grantor gets a current income tax deduction for the actuarial value of the remainder interest in the object and the entire value is removed from his estate for estate tax purposes. Rev. Rul. 57-293, 1957-2 Cum. Bull. 153).

28 Although no special tax advantages have been claimed herein for the revocable living trust, it appears that in some jurisdictions there is no inheritance tax at grantor's death with respect to assets of such a trust. For example, Nebraska and Wyoming appear to be such jurisdictions.

Careful records should be maintained on behalf of the partnership, also.

As in the case of the use of the individual joint tenancy, the purpose of the corporation or partnership is to assure that, even though the trust is undisclosed, there is a facility for the transfer of legal title to trust assets available to the surviving trustees after the death or legal incapacity of the grantor, thereby making recourse to a court decree unnecessary in the chain of title. Other acceptable forms of nominee arrangement can probably be devised by imaginative draftsmen.

The handling of unincorporated business interests as trust assets is a little more difficult. An unrecorded bill of sale or assignment of tangible and intangible assets and accounts receivable to the individual trustees (in their fiduciary capacities or as nominees) probably takes care of a proprietorship. The fact that such an undisclosed assignment may or may not be enforceable as against creditors is not particularly relevant as the writer is presuming a willingness on the part of the grantor to have his just debts paid both during his lifetime and after his death. Consequently, the properly drawn trust instrument will impose upon the trustees the obligation to pay the grantor's debts at death to the extent his probate estate, if any, is unable to pay them. We are entitled to presume that the grantor, as income beneficiary during his lifetime, will discharge his business debts as they arise.

A partnership interest is a bit more difficult. While, under the entity theory of partnerships adopted under the Uniform Partnership Laws, the assignment of a partnership interest carries with it all the assets and rights making up such interest,[29] an assignment not permitted by the partnership agreement or consented to by the partners is of limited efficacy.[30] The writer and his associates have, therefore, found it useful, where possible, to insert a provision in partnership agreements consenting to a partner's transfer of his partnership interest to trustees of a revocable trust so long as the partner is one of the trustees and the principal beneficiary. Again, whether or not such an assignment is effective to frustrate rights of creditors of the partner-grantor or of the partnership is not relevant, for reasons mentioned above. The limited objective, of course, is to vest the individual trustees with the legal right to transfer title to

29 Colo. Rev. Stat. §§ 104-1-25, 27 (1953).
30 Colo. Rev. Stat. § 104-1-27 (1953).

the assets making up the partnership interest to the successor trustee upon death of the grantor, or, in the alternative, to carry out the provisions of any buy-sell agreement that the grantor-partner or his trustees may have been party to.

Although not essential to the avoidance of probate objective, it would seem sound estate planning in many cases to have the death proceeds of life insurance and similar contracts made payable to the trustees of the revocable trust.[31] This can be accomplished by a mere change in beneficiary designation.

Summarizing this section on the costs of using the revocable living trust, it will be apparent that, other than the original costs of draftsmanship and supervision by an attorney, the actual costs, both in dollars and in loss of control, will be entirely minimal during the lifetime of the grantor. The economic objective of avoiding the costs of probate, therefore, will not be seriously frustrated.[32]

B. The Continuing Need for a Will

Notwithstanding the use of the revocable living trust as a will substitute, the draftsman is well-advised to prepare at the same time (for execution after the trust has been executed[33]) a simple will of the "pour-over" variety. The effect of the will is to transfer to the trust in a testamentary distribution any assets deliberately or inadvertently not included in the living trust, thereby funneling all assets through the trust in the interest of comprehensive estate planning. Where the preparatory work has been thoroughly done by the draftsman and the grantor has conscientiously followed instructions in his subsequent activities, there will be no need to do more than simply lodge this will with the probate court upon the grantor's death.

Regardless of liberalizing laws in some states,[34] the writer and his associates deem it desirable to physically bind into the will a conformed copy of the living trust for identification purposes. Language is also inserted in the will to the effect that, if the trust should have been revoked or for any reason be void or become invalid, the executor must nevertheless distribute the assets of the estate to a named trustee (normally the trust company named as successor trustee in the trust) to be used, handled and distributed according to the terms of a testamentary trust whose provisions are identical with those set forth in the revoked or void living trust. By having a copy of the trust bound into the will, there can be no question as to what these terms are.

Of course, if the grantor truly wanted to revoke his living trust because the terms were no longer satisfactory to him, he would take the additional precaution of changing his will (or of revising the trust and the "pour-over" will). The foregoing technique is

31 Colorado lawyers will be mindful that where, as here, the trust is charged with the payment of creditors, there will be a probable loss of the Colorado inheritance tax exemption on life insurance.

32 Figures as to savings used in actual examples appearing earlier in the text are net after drafting fees and post-death legal services.

33 See discussions of pour-over problems in Shattuck op. *cit.*, *supra* note 4, § 14; Polasky, "Pour-Over Wills," 98 *Trusts and Estates* 949 *et. seq.* (1959). See in particular Colo. Sess. Laws 1959, Ch. 286.

34 Colo. Sess. Laws 1959, Ch. 286; Polasky, *supra* note 33.

really intended to frustrate attack by a disgruntled party contending revocation or invalidity of the living trust. Even if he is successful in such action, he will be faced with an identical testamentary distribution of the estate, the only difference being that the value of the estate is now diminished by the probate and administrative costs that would otherwise be avoided.[35]

For the above reasons, and whether or not the applicable law so requires, the writer continues to recommend, whenever changes are made in the terms of the living trust, that the will thereafter be republished or rewritten, with the revised trust provisions physically bound therein.

C. Miscellaneous Drafting Suggestions.

In addition to the normal instructions, limitations, powers and duties pertinent to good trust draftsmanship, the writer urges that consideration be given to the following items in drafting a revocable living trust designed as a will substitute:

1. *Payment of Grantor's Debts and Taxes.* Responsible draftsmen will impose upon the trustees the affirmative duty to pay the just debts and taxes of the grantor to the extent the probate estate, if any, cannot do so. While taxing authorities have laws sufficient to protect themselves, it may be that other bona fide creditors would find their rights to be paid cut off or diminished in some jurisdictions. This has been previously commented on.

2. *Elections with Respect to Filing Estate, Income, and Gift Tax Returns.* Because of probable elimination of a probate estate, the duty to file estate and inheritance tax returns may necessarily fall on the trustees of the living trust.[36] This could also be true with respect to final income tax[37] and gift tax[38] returns of the deceased grantor. The trustees, therefore, should be expressly armed with the authority to make the various elections with respect to such returns. These include, for example, whether to deduct certain administrative expenses from the estate tax return or the income tax return—which election can affect the size of the marital deduction share, if any, and the rights of income beneficiaries and remaindermen under some circumstances; whether to file a joint income tax return with the deceased grantor's spouse—and assume liability for possible tax deficiencies of such spouse; and whether to file a joint gift tax return with the deceased grantor's spouse.

3. *Exoneration of Successor Trustees from Liability with Respect to the Administration of Prior Trustees.* An argument sometimes heard as a reason *not* to use a revocable living trust in the manner outlined in this paper is that the successor corporate trustee, because of its liability for the acts and doing of its predecessors, would have to charge an acceptance fee so substantial (to cover the expense of an audit of prior accounts) that the hoped for savings in avoiding probate administration would fail to be realized. This is nonsense. The successor trustee should be expressly exonerated

---

35 For this reason the writer and his associates had no hesitancy in recommending the use of the revocable living trust as a will substitute even during that period of time, prior to the 1958 Colorado Supreme Court reversal of the lower court holding in the Von Brecht case (note 6, *supra*), when the validity of this form of property disposition in Colorado was thought by some to be in doubt.

36 Int. Rev. Code of 1954, § 2203.

37 Int. Rev. Code of 1954, § 6012(b)(1).

38 Treas. Regs. 25.6019-1(b) (1958).

from the duty of inquiring into the prior administration and specifically permitted to conclude that the assets turned over to it by the prior trustees constitutes the entire trust estate.

4. *Nominee Powers.* As discussed at length earlier, a power permitting the trustees to hold title to trust assets in the name or names of one or more nominees is essential to the smooth operation of the trust during the grantor's lifetime.

5. *Power to Revoke.* Last but not least is the power to revoke, alter or amend retained by the grantor. This permits the trust instrument to be as ambulatory as a will and thereby qualify in all respects as a will substitute.

In conclusion, the writer believes that the current cost of probate administration is nothing more nor less than another "death tax" levied on the assets of a decedent's estate; that this particular expenditure produces nothing of benefit for the family of the deceased; that this drain on an estate is tolerated by the general public only because it has been led to believe that such costs are "normal" and unavoidable. The writer urges that the legal profession give greater consideration to the use of the revocable living trust as a means of reducing the high cost of dying.